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RECORD, CASE NO. 13843.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., 233.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

MOSES MOCK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED OCTOBER 21, 1889.

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1 In the United States circuit court, ninth circuit, district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MOSES MOCK, DEFENDANT.

Complaint.

Now comes the above-named plaintiff, by its attorney, S. G. Hilborn, esq., and complains of the above-named defendant, and for cause of action alleges: That on the first day of May, A. D. 1879, the plaintiff was, and for a long time prior thereto had been, and ever since has been, and still is, the owner and seized in fee, and entitled to the possession of all those certain tracts or parcels of land lying and being situate in the county of Fresno, State of California, and particularly described as follows: Being the northwest quarter, and the west half of the northeast quarter, and the northeast quarter of the northeast quarter of section fourteen (14), and the southeast quarter of section eleven, township ten, south range, twenty-four east, Mount Diablo meridian, together with all the trees growing and being thereon and all the appurtenances belonging to said land.

That the defendant, on the first day of May, 1879, and at divers times between that day and the thirty-first day of December, 1879, while the plaintiff was owner in fee and seized of said land and the timber and trees growing and being thereon, wrongfully and unlawfully, and without the consent of plaintiff, cut and caused to be cut the following timber, then and there being and growing upon the said above-described land, the same being then and there the property of the United States—that is to say, five hundred pine trees—and he, the said defendant, then and there manufactured the same into lumber, and the said five hundred pine trees produced one million and five hundred thousand feet of lumber.

And plaintiff further alleges that said lumber was of the value of fifteen thousand dollars.

And plaintiff further alleges that the said defendant wrongfully
2 and unlawfully and without the consent of plaintiff took said lumber heretofore described from the possession of the said plaintiff, and still unlawfully withholds and detains said goods and chattels from the possession of the plaintiff, to the plaintiff's damage in the sum of fifteen thousand dollars.

Wherefore the plaintiff demands judgment against the said defendant for the said sum of fifteen thousand dollars, the value of the said goods and chattels, with one thousand dollars damages and costs of suit.

S. G. HILBORN,
United States Attorney.

(Endorsed:) Filed May 6, 1884, L. S. B. Sawyer, clerk.
4819

3 United States of America. Circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MOSES MOCK, DEFENDANT.

Action brought in the said circuit court and the complaint filed in the office of the clerk of said circuit court in the city and county of San Francisco.

Summons.

The President of the United States of America, greeting, to Moses Mock:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the circuit court of the United States, ninth circuit, in and for the district of California, and to file your plea, answer, or demurrer to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the clerk of said court in the city and county of San Francisco, within ten days after the service on you of this summons—if served in this county; or if served out of this county, then within thirty days—or judgment by default will be taken against you.

The said action is brought to obtain a judgment against you for the sum of fifteen thousand dollars alleged to be due said plaintiff, being the value of one million and five hundred thousand feet of lumber manufactured from pine trees, the goods and chattels of said plaintiff, and wrongfully and unlawfully taken and withheld from the possession of said plaintiff by said defendant, and for the further sum of one thousand dollars damages, and for costs of this action; and if you fail to appear and plead, answer or demur, as herein required, judgment by default will be entered against you, and the plaintiff will apply to the court for the relief demanded in the complaint herein.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this sixth day of May, in the year of our Lord one thousand eight hundred and eighty-four, and of our independence the 108th.

[SEAL.]

L. S. B. SAWYER,
Clerk.
By F. D. MONCKTON,
Deputy Clerk.

4 (Endorsed:)

UNITED STATES MARSHAL'S OFFICE,
DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 10th day of May, 1884, and personally served the same on the 24th day of May, 1884, by delivering to and leaving with Moses Mock, said defendant named

therein, personally, at the county of Fresno in said district, a certified copy thereof, together with a copy of the complaint, certified to by L. S. B. Sawyer, clerk of U. S. cir. court, attached thereto.

San Francisco, May 29th, 1884.

M. M. DREW,
U. S. Marshal.
By C. H. PETERSON,
Deputy.

Filed June 9th, 1884. L. S. B. Sawyer, clerk. By F. D. Monckton, deputy clerk.

In the United States circuit court, ninth circuit, district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MOSES MOCK, DEFENDANT.
No. 3293.

Demurrer.

Now comes the above-named defendant and demurs to the complaint herein on the ground that the same does not state facts sufficient to constitute a cause of action.

Wherefore defendant prays judgment for costs of suit.

S. J. HINDS,
Attorney for defendant.

I certify that the above demurrer is well founded in point of law.

S. J. HINDS,
Attorney for defendant.

5 (Endorsed:) Service of a copy of within demurrer acknowledged this 31st Aug., 1885. S. G. Hilborn, U. S. attorney. Filed August 31st, 1885. L. S. B. Sawyer, clerk.

At a stated term, to wit, the November term, A. D. 1885, of the circuit court of the United States of America of the ninth judicial circuit, in and for the district of California, held at the court room, in the city and county of San Francisco, on Monday, the 4th day of January, in the year of our Lord one thousand eight hundred and eighty-4.

Present, the honorable George M. Sabin, U. S. district judge of Nevada

THE UNITED STATES OF AMERICA
vs.
MOSES MOCK.
No. 3293.

Certified copy of order overruling demurrer.

By consent of the respective counsel it is ordered that the demurrer herein be, and the same hereby is, overruled and that the defendant have to and including the 5th instant to answer herein.

(Endorsed:)

I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 19th day of April, A. D. 1888.

[SEAL.]

L. S. B. SAWYER,
Clerk.

By F. D. MONCKTON,
Deputy Clerk.

6 In the United States circuit court, ninth circuit, district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MOSES MOCK, DEFENDANT.

Answer.

Comes now the defendant herein and answering the complaint herein denies each and every allegation in the complaint contained.

Wherefore defendant prays judgment for his costs.

S. J. HINDS,
Attorney for Defendant.

(Endorsed:) Service of the within answer & receipt of a copy thereof admitted this 5th day of January, 1886. S. G. Hilborn, U. S. atty. Filed Jan'y 5, 1886. L. S. B. Sawyer, clerk.

U. S. circuit court, northern district of California.

THE UNITED STATES OF AMERICA
vs.
MOSES MOCK. } No. 3293.

Verdict.

We, the jury, find in favor of the defendant.

LOUIS P. SAGE,
Foreman.

(Endorsed:) Filed April 19, 1888. L. S. B. Sawyer, clerk. By F. D. Monckton, deputy clerk.

7 In the circuit court of the United States, ninth judicial circuit, northern district of California.

THE UNITED STATES OF AMERICA
vs.
MOSES MOCK. } No. 3293.

Certified copy of judgment.

This cause having come on regularly for trial on the 19th day of April, 1888, being a day in the February, 1888, term of said court, before the

court and a jury of twelve men duly impaneled by the clerk of said court, Jackson Hatch, esq., assistant U. S. attorney, appearing on behalf of the United States, and S. J. Hinds and W. H. Cook, esqs., appeared on behalf of the defendant, and the evidence on behalf of the respective parties having been introduced and closed and the cause, after arguments of counsel and the instructions of the court, having been submitted to the jury, and the jury having subsequently rendered the following verdict: "We, the jury, find in favor of the defendant"; and the court having ordered that judgment be entered herein in accordance with said verdict:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the court that the plaintiff take nothing by this action and that the defendant go hereof without day.

Judgment entered April 19th, 1888.

L. S. B. SAWYER,
Clerk.

(Endorsed:)

I hereby certify that the foregoing is a full, true, and correct copy of an original judgment entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 19th day of April, A. D. 1888.

[SEAL.] L. S. B. SAWYER,
Clerk.

Filed April 19th, 1888. L. S. B. Sawyer, clerk.

8 In the circuit court of the United States, ninth judicial circuit, in and for the northern district of California.

THE UNITED STATES OF AMERICA
vs.
MOSES MOCK. } No. 3293.

Clerk's certificate.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the ninth judicial circuit, northern district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the above-entitled action.

Attest my hand and the seal of said circuit court this 19th day of April, 1888.

[SEAL.] L. S. B. SAWYER,
Clerk.
By F. D. MONCKTON,
Deputy Clerk.

(Endorsed:) Judgment roll. Filed April 19th, 1888. L. S. B. Sawyer, clerk. By F. D. Monckton, deputy clerk.

9 In the circuit court of the United States for the ninth circuit, district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF, v. MOSES MOCK, DEFENDANT. } No. 3293. Bill of exceptions.

Bill of exceptions.

Be it remembered: This action was tried in the above-named court before a jury in the month of April, 1888. At the trial the following proceedings took place:

R. W. ANDERSON, a witness for plaintiffs, being sworn, testified as follows:

I am now, and have been since the year 1886, a special timber agent of the Government. In 1887 I visited the lands described in the complaint, under instructions from the department at Washington. I went to make an estimate of the amount of timber that had been cut from that land. I went there with Mr. Jarvis, a surveyor, and Mr. Converse.

(The witness here identified a paper shown to him.)

I have seen that paper before. I had it in my possession at the time I went to that land, and I got it from the district attorney. (It contained a description of the land named in the complaint.) I examined the land named in the complaint at that time. I found it by reference to the Government surveys. Mr. Jarvis was a practical surveyor and did the surveying. From section fourteen the best of the timber had been cut. I could tell this by the stumps. I counted them. We counted the firs, sugar pines and yellow pines, and cedars. We counted on the northwest quarter of that section, and the west half of the northeast quarter, and the northeast quarter of the northeast quarter of that section. That is the land involved in this action. We also went to section eleven, and we there counted the stumps on the south-east quarter and the north
10 half thereof. In counting there we counted in the same way and the same quality of timber as on section fourteen. We could tell whether the trees had been cut for milling purposes or for shake-making purposes, and in making the count of stumps we did not take into account any that had been cut for shake purposes. We measured the trees from near on the ground where they fell. We could see where they were sawed off at the top. We counted probably a hundred trees and measured them, and then got the average measurement from them. We counted the number of stumps on this land. We divided the work, and when we counted a stump we would put a stick on it, so that it would not be counted twice. We intended to count all of the stumps except those that had been left by the shake-makers. We actually counted all the stumps on the part of section fourteen named in the complaint. On section fourteen there were 322 sugar pine stumps, 47 yellow pine stumps, 38 fir stumps, and 26 cedar stumps. These were counted on the part of section fourteen described in the complaint. On the part of section eleven named in the complaint there were 325 sugar pine, 120 yellow pine, 43 firs, and 44 cedars. In making this count I personally went over the part of section eleven named in the complaint. The timber grew regularly, or nearly so, over that sec-

tion. Portions of the country there are mountainous and others are level. From the southern part of section fourteen a mountain range makes up where it comes up to section one, and gets into section two. It is on the north portion of section fourteen. There is a valley where the mill is on section two. This mill makes up between sections fourteen and two, about the northern portion of section fourteen. About the highest part of the ridge is on section eleven. This ridge runs through section eleven. On section fourteen the country slopes to the south, nearly across the section. Where the mill was there was a small stream of water. It ran over the west half of the northeast quarter of section fourteen, and nearly across the section. I found out where the claim taken up by Ruth was, and was on that claim. It is on the southern part of section fourteen. It is the north half of the southeast quarter. On that claim I found a place where there were signs of a mill—sawdust and old timber. This was on the north part of the northwest quarter of the southeast quarter. I also saw signs of a
11 mill having been on the southwest quarter of the northeast quarter of that section. The second mill site is directly north from the first one, and about a quarter of a mile. It was very near the centre of section fourteen; about 200 yards northeast of the centre. It is located on the stream spoken of. I counted the stumps on the north and northwest of this last mill site, and for about a half or three-quarters of a mile. There was cutting also on the east half of the northeast quarter of that section. I noticed some roads up there, and those on the north and northwest led in the direction of this mill, from the north and northwest, from where the timber had been cut on section fourteen. We made an estimate of the amount of timber that had been cut on sections eleven and fourteen by measuring the trees—the length and diameter. We were guided by Spaulding's tables, a standard measure. We measured the stumps of a hundred different trees in different localities, and then we estimated from them the amount of timber cut.

We measured the diameter of the stumps. The stumps were about two or three feet high, and we measured across the tops of them. Usually, where we made these measurements, except about the mills, the tops of the trees were gone. The stumps averaged more than 36 inches. The cuts, as near as we could ascertain, of the trees were about sixteen feet long, and the trees averaged about four sections of sixteen feet each. A section of the size referred to would produce about 950 feet of lumber, board measure.

Cross-examination:

I know nothing about who cut this timber. I counted only on the land described in the complaint. We went around that land and counted all the stumps on them. It took us about a month. We were always in sight of each other. The stumps were usually old ones. We counted along different places on different sections, and got an average in that way. The fir stumps went into our calculations. The two saw-dust piles or mill sites were—I did not measure the distance between them, but I guessed it. We found stumpage near the saw-dust pile, by Ruth's place.

H. A. JARVIS, the witness referred to in the testimony of the previous witness, being sworn, testified to about the same facts as the witness Anderson.

12 M. MOCK, the defendant, was sworn as a witness on the part of the plaintiffs, and testified as follows:

I reside in Fresno County, California; am defendant in this action. I know Messrs. Humphries and Donohoe. I was engaged in milling operations on Pine Ridge, in said county, in 1879, about three months. Was in that section of country first in 1867. I am by occupation a sawyer; have been for thirty years. Was in the saw-mill business on Pine Ridge, Fresno County, in 1879. I know where the claim of Mr. Ruth is. I do not know what section it is on, but do know where the mill is. I know the place you allude to—the Piute mill That is on the land he now claims as a pre-emption or homestead. In 1879 I operated a mill a half a mile above that—north of that. It generally went by the name of the Mock mill. There was a stream of water there called the Chillares Creek; it ran south. There was one mill north of that; about a mile and a half north of the Mock mill. This same mill—the Mock mill—was moved up there in 1880. In 1879 there was a Flint-lock mill nearly west of the Mock mill; it was about a mile and a half from my mill. The Ruth mill was there in 1879, and it was under a mile and a half from my mill. There was no other mill there at that time. I operated the Mock mill that year a little less than three months. It had a capacity of about ten thousand feet, board measure, a day. The timber that I operated this mill with came from—nearly all of it—the west and southwest. I had about five men and two or three Indians at work there. There might have been a few trees cut that year north of the mill and used in the mill. I did not cut any northwest of the mill. It is my recollection that all the timber that went to that mill was west and southwest. There might have been some cut north, but very little. None at all was cut to the northwest of the mill. This mill was running there in 1880, and then it was moved up to north of there. I sold my lumber there, and the price of it there was eight and ten dollars a thousand feet. I did not sell all that I made. I did sell it when I sold the mill, which I did to Mr. Donohoe in 1880. I knew when I went to cutting there that that was Government land. I did not at any time enter that land as a homesteader or pre-emptioner.

13 Cross-examination:

In 1879 I did not run as long as three months. That mill was not profitable. The reason that I shut down so soon was that I did not think that I would be able to pay the hands.

M. J. DONOHOE, a witness on the part of the plaintiffs, being sworn, testified as follows: I know the Mock mill that was referred to by the last witness. I know that Mock ran that mill in 1879. He got timber from all about the country there. I saw them cutting timber for the mill south and west, within a half of a mile from the mill. I was there two or three times while that mill was being operated by Mock in 1879. I was also engaged in milling that year about a mile and a half southwest from there. The mill was the Flint Lock. In 1880, when I ran this Mock mill, I cut some logs not far from the mill to the east. We cut east and north. When I went there in 1880 there was timber that had been cut around that mill. I do not know of any other mill cutting within a half a mile of the Mock mill prior to that mill. There were within three-quarters of a mile. There were three of them that could have got timber within that

distance. They could have got it northwest and north of the Mock mill. Not southwest of it. The trees down in that section of the country in 1879 would average 600 feet to the cut log of sixteen feet long. That is a fair average. From the Mock mill the country sloped south and on the north it was up hill.

M. MOCK, the defendant, was recalled and testified on the part of the plaintiffs as follows: In 1879 when I operated this mill no one but me cut north or west of the mill. Mine was the first mill there. Up to the time I went there I do not think that any cutting had been done to the north or northwest of the mill. It is my recollection that all that was cut was to the west and southwest. All the logs that came to that mill while I operated it came from the south and southwest. There were no trees cut north and northwesterly at that time. There was a good growth of timber north of the mill and also northwest and west. It was west and southwest that we did our cutting mostly. We only cut in one place that season. It was ten or eleven acres, I suppose. It was all in one
14 place except what we did up to the north. When I went there I intended to cut there, for I had to keep the mill in the wood. The cutting was done under my direction. The land slopes towards the south from that mill, and to the southwest. There were some logs hauled up hill to the mill—I think about half of them. The timber that I got from the west of the mill I did not have to haul up hill. If I had got timber from the northwest I would have hauled it down hill.

Cross-examination:

In 1879 the supply of lumber in that county was from the mountains. None of the lumber in 1879 was sent out of the county; it was all sold to the ranchers. They came out with their wagons and hauled it away to build their houses with. In that year I could not buy any of that land from the Government because it was not then in market.

H. E. TRUEWORTHY, a witness on the part of plaintiffs, being sworn, testified as follows:

In the summer of 1879 I was at work at the Flint Lock mill; Mr. Mock was running that year the Mock mill. I was there a few times during that season. I saw the logging teams around that mill that season, getting the logs around there, in a westerly direction, maybe a quarter of a mile or so. The Flintlock mill was close by there; it was operating southwest of the Mock mill. In 1880 when I was at work for Humphries and Donohoe we had timber cut up northwest of the mill, and north and west of it. There was no timber cut off north of the Mock mill when I was there.

H. E. BAILEY, a witness on the part of the plaintiffs, being sworn, testified as follows:

In 1879 I was at work at the Flintlock mill, on Pine Ridge, Fresno County, and for a while I had something to do with the cutting of the timber. I do not know exactly in what direction from the mill we cut, but think that it was northeast of it, and about three-quarters of a mile away from it. It was about a mile and a half from there over to the Mock mill.

Counsel for the plaintiffs here offered in evidence an abstract from the records of the United States land office at Stockton, California, showing, among other things, that the lands described in the complaint were
15 in township ten south, range twenty-four east, Mt. Diablo meridian, and that the claim of Ruth, referred to in the evidence, embraced the east half of the northeast quarter and the north half of the southeast quarter of section fourteen, in said township, and was cash entry No. 8319, of date July third, 1885, under the act of Congress of June third, 1878, and that said abstract was duly certified to and authenticated by the register of said land office, and that it showed also that the official plat of said township was filed in said land office on June 4th, 1881, which said abstract was admitted in evidence.

The testimony was then closed.

Counsel for both sides then argued the cause before the jury.

Thereupon the court on its own motion gave to the jury the following instructions, and the exceptions noted to portions thereof, hereinafter appearing, were then and there duly taken by the counsel for the plaintiffs:

The COURT (orally). Gentlemen of the jury: I observe a number of jurors on the panel to-day that were on the panel that tried the case yesterday. Were the case tried by the same jury the remarks that I should deem it necessary to make to you in submitting the case to you would be very brief. I might refer to the remarks that I made yesterday, which many of you may remember, because the cases are so similar.

This is an action wherein the Government commenced a suit against the defendant to recover the sum of $15,000 for alleged trespass upon its land in cutting and removing timber between the 1st of May and the 31st of December, 1879, from land situated in what is now the county of Fresno. It is conceded that the land described in the complaint was at that time unsurveyed public land. That being so, the Government, of course, was the owner of the land, and as such owner owned all that was upon and in the land, the soil and the trees; in fact, the Government, as the proprietor of the public domain, owns it exactly as any of you gentlemen own your houses or lots or your farms or your mines. The Government has the same rights, no more and no less; that is, the rights of an absolute owner.

16 The complaint in this case alleges the damages at the sum of $15,000, the value of the timber alleged to have been removed; and it alleges further the sum of $1,000 for damages to the realty for cutting and removing the timber from the realty, but I understand counsel forego that claim, and the only matter for you to decide is as to the value of the timber. The question for you to decide is, first, did the defendant enter upon this land and cut and remove from it any portion of timber or any timber of the character alleged in the complaint in the year 1879; and, if so, how much did he cut and remove; and, secondly, what was the value of the timber? The evidence was all put in before you this morning, and is very fresh in your recollection. It is very much like the evidence in the case yesterday; many of the witnesses are the same, and, as I said to the jury in regard to the testimony of Anderson and Jarvis, all they could know about this case and all they know about the subject-matter was that they went down there and ran out the lines over these two sections, section 14 and 11, in township 10, in 1887, and counted the stumps

that they saw on this land described in the complaint. As to who cut the trees, of course, they have no knowledge one way or another. You remember their evidence, that some of the trees looked as if they had been cut a long time. The only affect of their evidence is to show as data how much timber might have been cut on these sections, and you had their estimate of how much timber each tree could produce. Another man named Converse thought that the trees would cut 4,000 feet of lumber to the tree. But Mr. Donahue thinks, from his experience running through years, that a fair average is only 600 feet to the cut, which would be 2,400 feet to the tree, a defference of 1,600 or 1,800. As to whose estimate is most correct in regard to the matter, that rests wholly with you. It is a conceded fact in this case, claimed on the part of the prosecution and testified to by the defendant himself, that in the year 1879 he had a mill there upon or near the lands described in this complaint; that during that year timber was cut mostly to the west and the southwest of where his mill was. I understood him in his testimony this morning to say that he thought there were a few trees also cut to the north, but when recalled this afternoon his impression seemed to be different; he thought there was no timber cut north of the mill, but rather north and northwest.

17 Whether that brings any timber on the land described on the complaint under the evidence you are to decide. As a matter fact and law in this case it is immaterial where the timber came from that he cut in 1879, if it was not cut on the land described in the complaint, and which is made the basis of this action. As to the amount of timber that may have been on those sections of land, I will call your attention to the fact of the rather general manner in which the witnesses for the Government arrived at their conclusions. They have gone over there and counted the stumps and made estimates, but in the practical affairs of life we find that such estimate' are not usually accurate. As I observed, it is conceded by the defendant himself that he cut some timber on this land, but how much he cut he does not know. I believe he is entirely honest and sincere in that statement, and I do not believe that any one of you gentlemen engaged in the same business could tell or even approximate. He said that he ran his mill but a short time; that it did not pay, and he was afraid that he would not be able to pay his hands, so he made the season very short. No estimate is given whatever as to the amount of timber cut for the mill that year, and no estimate is given from any source as to the amo'nt that came from any of the land described in the complaint here. I believe that is entirely true. The attorney for the United States suggests that it is fair to assume that one-half at least of the timber cut at this mill in 1879 came from section 14. Well, gentlemen, I must say to you that in all matters of verdicts and judgments, of course, we do not assume very much. It is a matter of proof, and it is a very serious thing, as I said to you yesterday, to say that one man shall pay to another $15,000 or $16,000, and you can not do it on an assumption; you must do it on proof that is clear and satisfactory to your minds. As I observed yesterday, in civil matters we do not require the strong proof we do in criminal matters. We do not require the same certainty we do in criminal matters. In civil matters no jury has a right, however, to return a verdict unless it is satisfied of the justice of the demand of one party against another, and the just amount of that demand. I say to you, gentlemen,

that you have no right to guess in regard to matters of this kind, and unless proof has been offered which creates a reasonable certainty in your minds as to the amount of timber that has been cut on this land in
18 1879, and also proof of its value—unless such proof has been offered to you on those two points the verdict must be for the defendant. The same rule applies to the United States Government as to an individual. The United States stands before you in the same light as any one of you gentlemen would stand suing another gentleman, and it must make proof of its cases.

There are two elements entering into these cases. This is an action of trespass, a tort. It is wrong for one person to go on another person's land and cut and remove timber without the consent of the owner; so the going of any person on the public domain and cutting and removing from it timber without the consent of the Government is wrong, just as much as if I went on any of your ranches or vineyards, cut, and removed the crops without your consent. But there is a vast difference in the character and quality of actions. A gentleman may permit the public to use a portion of his domain as a highway for years, and as long as it is being done with his tacit consent nobody would be held a trespasser for doing so; but when he notifies the public that it must cease, then that tacit right ceases, and anybody who went on there might be justly held as a trespasser. The history of the country in regard to trespassing on the public domain and cutting timber *of* the use of the people in building their homes upon their farms and for general domestic purposes may be considered. As I observed, the Government is the proprietor of the soil. It has always owned the soil, and the timber on it and the mines beneath it; but it is a matter of common knowledge in this country that the country could not have been settled up otherwise than by the practice and custom which has grown up in advance of legislation. It is a matter of history that the Government permitted the early pioneers, as they went ahead to make their homes for themselves to go on the public domain and take such timber as was necessary for domestic use, and although there never was any law or license to that effect; it was done with the knowledge of every department of the Government—legislative, judicial, and executive. The earliest law that was passed that I remember was in 1833, forbidding, under pains and penalties, the entering on lands that had been reserved on which there were valuable forests of live oak and pine for ship-building. It is possible that there was other legislation following that,
19 but I do not remember any until 1878, and during all that time every department of the Government knew how the country was being settled, and that men went on and felled trees with this tacit permission, or, if there was not a tacit permission, at least there was no reprehension of their acts. In this case, in order to judge wisely and fairly of this defendant as to whether he was a wanton trespasser, you will have to take into consideration the concurrent circumstances surrounding his acts. While I wish to understand that I am not aware of any license having ever been given in the last sixty years to any party to go on the public domain and cut timber, no court has ever held, and no court would be justified in holding, that these men were all criminals who went on and put up a little mill for the purpose of aiding their neighbors in procuring lumber for domestic purposes. I say you will not judge correctly whether

these men were willful and wanton trespassers in the sense in which a trespass is willful and wanton, unless you take into account the contemporaneous history of the country and these matters, which are familiar to you all. If this party was a willful trespasser and cut from the public domain this timber wantonly and maliciously, the Government is entitled to recover from him the full value of the timber by him so cut and removed from the public domain, without allowing at all for the increased value that he put upon it; for it will not be permitted that a man shall trespass on your property and commit waste and wanton destruction by removing it, that you shall be merely idemnified for the original value—in other words, you may recover your property and its value wherever you find it, whether the man has added to its value since he got it or not. This case is somewhat different from the case yesterday. This case presents this naked fact: That if you return a verdict for the Government it must be for the value of the lumber manufactured. Now, no evidence has been offered in the case showing the market value of the trees, or if they had any market value one way or the other. There is no evidence in the case to warrant you in concluding that the trees had any market value in 1879 or at any other time. The only evidence offered by the Government is as to the value of the timber after it was cut and made into lumber, and in that way this case differs from the case yesterday. Yesterday I instructed you in that case that if you find that although there was a trespass, that it was not willful, you might determine the value of the timber as it stood on the ground. In this case there is no evidence of that kind. Now, then, gentlemen, I submit this case to you, and these are the facts for you to determine: First, did this party commit this waste on the public land? As I stated to you, it is conceded that in the year 1879 he did cut some timber on the public domain, and I say there is no evidence offered as to its value, any further than that after it was made into lumber it was worth $8 or $9 a 1,000. I refer again to what I said to you gentlemen that in this, as in any other case, the evidence upon which you render a verdict fixing a liability upon any party must be clear. You must be able to determine, first, that there was a liability from the evidence, and secondly, by evidence satisfactory to your minds and consciences the amount of the liability in this case. Should you find for the plaintiff, your verdict will be in the following form: "We, the jury, find in favor of the United States, plaintiff, and assess the damages at ———," whatever sum you find, which sum you will insert. If you find for the defendant, the form will be: "We find for the defendant."

Mr. HATCH. I desire to except to that portion of the charge of the court in which comment is made on the testimony of the witnesses Anderson and Jarvis.

The COURT. In what respect?

Mr. HATCH. Where it was stated that the effect of their testimony, I think it was, was to serve as a data of the amount of timber that might have been on the land originally.

The COURT. I do not remember stating that, but that was the legal effect of it.

Mr. HATCH. And also to that portion of the charge and the suggestions of the court in the charge touching the history of the attitude of the Government towards pioneers and others who took timber from Government land for domestic use; and also the statement in the charge that the acts

of the defendant ought to be viewed by the jury with reference to the general attitude of the Government, as before referred to. I also understood your honor to charge the jury that in order to be willful it must be an act with some malice.

21 The COURT. I think did use the word malice, but when I said malcious trespass I will correct that and say a willful and wanton trespass.

Mr. HATCH. I also desire to reserve an exception to the instruction that unless the jury find that the defendant was guilty of a willful trespass they could not render any verdict at all for the plaintiff, because there was no evidence in this case as to the value of the timber as it stood in the forest.

The COURT. What I meant to say was that if they found a verdict at all it must be for the timber as lumber. You offered no evidence as to the value of the timber as it stood.

Mr. HATCH. But I understand that the Government is entitled to nominal damages. I desire to reserve an exception to that portion of your honor's charge.

(The jury then retired.)

Thereupon the jury retired in proper manner, and afterwards returned into court and duly declared a verdict in favor of the defendant.

Assignment of errors.

The court erred in giving to the jury those parts of the instructions that were excepted to by the counsel for the plaintiffs, to wit:

That which commented on the testimony of the witnesses Anderson and Jarvis.

That part of the instructions and the suggestion of the court touching the history of the attitude of the Government towards pioneers and others who took timber from Government lands for domestic use; also the statement in said charge that the acts of the defendant ought to be viewed by the jury with reference to the general attitude of the Government as before referred to; also to the statement in the charge that unless the jury find that defendant was guilty of a willful trespass they could not render any verdict at all for the plaintiffs, because there was no evidence in the case as to the value of the timber as it stood in the forest.

Specification of insufficiency of the evidence.

The evidence fails to justify the verdict because it affirmatively

22 appears therein that the defendant owned and operated the mill that was known as the Mock Mill, referred to in the testimony, during the season of 1879, and that it was so operated by him for the purpose of manufacturing lumber from the timber cut by him on the public domain without license and for the purposes of sale to the public, and also that a large amount of timber was cut by the defendant on the lands described in the complaint for that purpose, and by him manufactured into lumber, and by him sold as such for purposes of profit to him.

JNO. T. CAREY,
U. S. Attorney and Attorney for Plaintiffs.

Settled and allowed this 24th day of July, A. D. 1889.

GEO. W. SABIN,
Judge.

(Endorsed:) Filed Sept. 17, 1888. L. S. B. Sawyer, clerk. Settled and re-filed July 24th, 1889. L. S. B. Sawyer, clerk. By F. D. Monckton, deputy clerk.

23 In the circuit court of the United States of the ninth judicial circuit, in and for the northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF and plaintiff in error,
vs.
MOSES MOCK, DEFENDANT AND DEFENDANT IN error.

I, L. S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, in and for the northern district of California, do hereby certify that the foregoing twenty-two written or printed pages, numbered from 1 to 22 inclusive, are a full, true, and correct copy of the record and of all proceedings in the above entitled action, and that the same together constitute the return to the annexed writ of error.

Attest my hand and the seal of said circuit court this 16th day of September, A. D. 1889.

[SEAL.] L. S. B. SAWYER,
Clerk.

24 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judges of the circuit court of the United States for the ninth circuit, northern district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said circuit court, before you, between The United States of America, plaintiffs and plaintiffs in error, and Moses Mock, defendant and defendant in error, a manifest error hath happened to the great damage of the said plaintiffs and plaintiffs in error, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 25th day of July, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

[SEAL.] L. S. B. SAWYER,
Clerk U. S. Circuit Court, 9th Circuit, Northern District of California.

The above writ of error is hereby allowed.

GEO. M. SABIN, *Judge.*

25 *The answer of the judges of the circuit court of the United States for the northern district of California.*

The record and all proceedings of the plaint, whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States of America within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

L. S. B. SAWYER, *Clerk.*

(Indorsed:) 3293. United States Supreme Court. The United States of America, pl'ffs & pl'ffs in error, vs. Moses Mock, def't & def't in error. Writ of error. Filed July 31st, 1889. L. S. B. Sawyer, clerk U. S. circuit court, northern district of California.

26 UNITED STATES OF AMERICA, ss.

To Moses Mock, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1889, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the northern district of California, in that certain action wherein the United States of America are plaintiff in error and you are defendant in error, to show cause, if any there be, why the error and judgment in the said action mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Geo. M. Sabin, acting judge circuit court of United States of America, 9th circuit, northern district of California, this 31st day of July A. D. 1889, and of the Independence of the United States the one hundred and fourteenth.

GEO. M. SABIN, *Judge.*

27 We hereby acknowledge due service upon us of a copy of the within citation this July 31, 1889.

WM. HOFF COOK, and
S. Y. HINDS,
Attorneys for Defendant.

(Indorsed:) 3293. In the Supreme Court of the United States. The United States of America, pl'ffs in error, vs. Moses Mock, def't in error. Citation. Filed July 31st, 1889. L. S. B. Sawyer, clerk U. S. circuit court, northern district of California.

(Indorsement on cover:) No. 233. The United States, plaintiff in error, vs. Moses Mock. 13843. N. California, C. C. U. S. Filed October 21, 1889.

149 U.S. 273

Office Supreme Court U. S.
FILED.
APR 20 1893
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, PLAINTIFF in error,
vs.
MOSES MOCK. } No. 233.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, PLAINTIFF in error, *vs.* MOSES MOCK. } No. 233.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The suit which is here brought up by writ of error was commenced by the United States against Moses Mock, the defendant below, and in error, by the filing of a complaint, May 6, 1884, in the circuit court of the United States for the northern district of California. (Rec., p. 1.)

It is alleged in the complaint that the United States was May 1, 1879, and previously, and ever since said date had been, the owner of certain described lands situated in Fresno County in the State of California; and that the defendant, on May 1, 1879, and at divers times between that day and December 31, 1879, wrongfully and unlawfully, and without the consent of plaintiff, cut and caused to be cut timber then growing on said land, five hundred pine trees, and then and there manufactured the same into 1,500,000 feet of lumber, which lumber was of the value of $15,000.

It is also alleged that defendant wrongfully and unlawfully and without the consent of plaintiff took said lumber from the possession of plaintiff and still unlawfully withholds and detains said goods and chattels from the possession of plaintiff, to plaintiff's damages in the sum of $15,000. Judgment is demanded for the $15,000, and for $1,000 damages and costs.

Trial was had April 9, 1888, before Judge Sabin and a jury, and, after hearing the evidence and receiving the instructions of the court, the jury found in favor of the defendant, and judgment was entered accordingly (p. 5).

All of the questions presented by this case arise from the instructions given by the court to the jury.

ASSIGNMENTS OF ERROR.

(1) The court erred in instructing the jury as follows (pp. 10, 11):

> It is very much like the evidence in the case yesterday; many of the witnesses are the same, and, as I said to the jury in regard to the testimony of An-

derson and Jarvis, all they could know about this case and all they know about the subject-matter was that they went down there and ran out the lines over these two sections, section 14 and 11, in township 10, in 1887, and counted the stumps they saw on this land described in the complaint. As to who cut the trees, of course, they have no knowledge one way or another. You remember their evidence, that some of the trees looked as if they had been cut a long time. The only effect of their evidence is to show as data how much timber might have been cut on these sections, and you had their estimate of how much timber each tree could produce.

(2) The court erred in charging the jury as follows (pp. 12, 13):

It is a matter of history that the Government permitted the early pioneers, as they went ahead to make their homes for themselves, to go on the public domain and take such timber as was necessary for domestic use, and although there never was any law or license to that effect, it was done with the knowledge of every department of the Government—legislative, judicial, and executive. The earliest law that was passed, that I remember, was in 1833, forbidding, under pains and penalties, the entering on lands that had been reserved on which there were valuable forests of live oak and pine for shipbuilding. It is possible that there was other legislation following that, but I do not remember any until 1878; and during all that time every department of the Government knew how the country was being settled, and that men went on and felled trees with this tacit permission, or, if there was not a tacit permission, at least there was no reprehension of their acts.

In this case, in order to judge wisely and fairly of this defendant as to whether he was a wanton

trespasser, you will have to take into consideration the concurrent circumstances surrounding his acts. While I wish to understand that I am not aware of any license having ever been given in the last sixty years to any party to go on the public domain and cut timber, no court has ever held, and no court would be justified in holding, that these men were all criminals who went on and put up a little mill for the purpose of aiding their neighbors in procuring lumber for domestic purposes. I say you will not judge correctly whether these men were willful and wanton trespassers in the sense in which a trespass is willful and wanton unless you take into account the contemporaneous history of the country and these matters, which are familiar to you all.

(3) The court erred in instructing the jury (f. 19, p. 13) as follows:

> This case presents this naked fact: That if you return a verdict for the Government it must be for the value of the lumber manufactured.

POINTS.

I.

THE COURT ERRED IN CHARGING THE JURY.

The defendant, Mock, was called and examined as a witness on behalf of the United States (pp. 8, 9), and states that he had been a sawyer by occupation for thirty years; that in 1879 he occupied a mill called the Mock mill, located a half mile north of the Ruth mill.

That he occupied the Mock mill in 1879 a little less than three months; that it had a capacity of cutting 10,000 feet, board measure, per day; that he "had about five men and two or three Indians at work there."

He says:

> There might have been a few trees cut that year north of the mill and used in the mill.

He then places the cutting west and southwest of the mill. He then adds:

> There might have been some cut north, but very little.

He sold the lumber for $8 and $10 per 1,000 feet. He says:

> I knew when I went to cutting there that that was Government land. I did not at any time enter that land as a homesteader or a preëmptioner.

The foregoing testimony appears on page 8 of the record. On being recalled (p. 9) he seeks to locate the cutting to the west and southwest of the mill, thus attempting to avoid admitting that the lumber was cut on the land described in the complaint.

But he then adds:

> It was west and southwest that we did our cutting *mostly*.

He says, of the cutting, also:

> It was all in one place, *except what we did up to the north*.

As all cutting done to the north of the mill was, necessarily, on Government lands described in the complaint, the significance of this admission is apparent He says also:

> The cutting was done under my direction.

It will be remembered that the witness, Anderson, locates this mill (fol. 11) 200 yards northeast of the cen-

ter of section 14, thus leaving a corner of the land described in the complaint to the south and west of the mill.

In this case the lands involved are the southeast quarter of section 11, and the north half of section 14, and include all of that north half except the southeast quarter thereof (pp. 1, 6).

The mill known as the Mock mill which cut the lumber claimed upon, was located a little to the northeast of the center of section 14.

As, of course, section 11 is directly north of section 14, the lands described in the complaint are northwest, north, and northeast of the mill.

The witnesses Anderson and Jarvis identified and examined the land, and counted the trees cut upon it for purposes of lumber. They show that 814 pine trees had been so cut on that land (pp. 6, 7).

They described the mill site, the land, and the old roads. The stumps measured averaged more than thirty-six inches.

They found the trees to average four sections of sixteen feet each to the tree; and state that a section would produce 950 feet of lumber board measure (fol. 11).

A.

The court, in charging the jury, said (pp. 10, 11):

> It is very much like the evidence in the case yesterday; many of the witnesses are the same, and, as I said to the jury in regard to the testimony of Anderson and Jarvis, all they could know about this case and all they know about the subject-matter was that they went down there and ran out the lines over

> these two sections—sections 14 and 11, in township 10, in 1887—and counted the stumps they saw on this land described in the complaint. As to who cut the trees, of course, they have no knowledge one way or another. You remember their evidence, that some of the trees looked as if they had been cut a long time. The only effect of their evidence is to show as data how much timber might have been cut on these sections, and you had their estimate of how much timber each tree could produce.

An exception to this portion of the charge appears at the foot of page 13.

It is submitted that the instruction quoted is erroneous.

B.

The court charged the jury as follows (pp. 12, 13):

> It is a matter of history that the Government permitted the early pioneers, as they went ahead to make their homes for themselves to go on the public domain and take such timber as was necessary for domestic use, and although there never was any law or license to that effect, it was done with the knowledge of every Department of the Government—legislative, judicial, and executive. The earliest law that was passed that I remember was in 1833, forbidding, under pains and penalties, the entering on lands that had been reserved on which there were valuable forests of live oak and pine for shipbuilding. It is possible that there was other legislation following that, but I do not remember any until 1878, and during all that time every Department of the Government knew how the country was being settled, and that men went on and felled trees with this tacit permission, or, if there was not a tacit permission, at least there was no reprehension of their acts.

> In this case, in order to judge wisely and fairly of this defendant as to whether he was a wanton trespasser, you will have to take into consideration the concurrent circumstances surrounding his acts. While I wish to understand that I am not aware of any license having ever been given in the last sixty years to any party to go on the public domain and cut timber, no court has ever held, and no court would be justified in holding, that these men were all criminals who went on and put up a little mill for the purpose of aiding their neighbors in procuring lumber for domestic purposes. I say you will not judge correctly whether these men were willful and wanton trespassers in the sense in which a trespass is willful and wanton, unless you take into account the contemporaneous history of the country and these matters, which are familiar to you all.

An exception to this portion of the charge is noted at the foot of page 13 and top of page 14.

It is manifest that this portion of the charge is contrary to law, and that it was not justified by the testimony received on the trial, and that the jury may have been misled by the erroneous instruction.

C.

The court charged (fol. 19, p. 13):

> This case presents this naked fact: That if you return a verdict for the Government it must be for the value of the lumber manufactured.

This is excepted to (fol. 21) on the ground that the jury might find in favor of the Government for nominal damages.

It is respectfully submitted that, taking the strongest view permissible against the case made by the Govern-

ment, the jury should have been allowed by the court to have rendered a verdict in the plaintiff's favor for nominal damages.

It is probably true that the jury might have found from the evidence that the timber cut at the Mock Mill in 1879 was cut from other Government land than that described in the complaint; but it is unquestionably true that the jury was authorized by the testimony to find that a portion of the boards so cut came from timber taken from lands so described.

Therefore it can not appear, beyond doubt, that the instructions given did not and could not have injured the rights of the public as represented in the suit.

The rule in point is declared by this court in *Vicksburg, etc., Railroad* v. *O'Brien* (119 U. S., 103), as follows:

> While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party. (*Smiths* v. *Shoemaker*, 17 Wall., 630, 639; *Deery* v. *Cray*, 5 Wall., 795; *Moores* v. *Nat. Bank*, 104 U. S., 625, 630; *Gilman* v. *Higby*, 110 U. S., 47, 50.)

It is respectfully submitted that error appears, as shown, and that the judgment below should be reversed.

A. X. PARKER,
Assistant Attorney-General.